No. 82-1024

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE BOEING COMPANY,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR DIVISION 10 OF THE DISTRICT OF COLUMBIA BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS (NOW MERGED INTO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT)

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QUESTIONS PRESENTED

1. Whether Congress may establish a Legislative Branch agency empowered to prescribe rules binding on Executive Branch agencies, without violating constitutional separation-of-powers principles?

2. Whether Congress may delegate rulemaking authority to a Federal agency, where the manner of appointment of the members of the agency is contrary to the Appointments Clause?

3. Whether Congress, through rules promulgated by a Legislative Branch agency, may supplant Executive Branch agency rules, where the Legislative Branch agency's rules are given effect without satisfying the requirements of the Presentment Clause?

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Division 10 of the District of Columbia Bar Association files this brief as *amicus curiae* in support of the petition for a writ of certiorari filed herein by the Boeing Company ("Boeing") to review a judgment of the United States Court of Claims entered on June 2, 1982.* Written consent of the parties to the filing of this *amicus* brief has been transmitted to the Clerk of this Court.

**Boeing Co.* v. *United States*, 680 F.2d 132 (Ct. Cl. 1982), *reprinted in* Appendix to the Petition for Certiorari ("Pet. App.") at A-1.

INTEREST OF AMICUS CURIAE

Division 10 of the District of Columbia Bar Association is a membership organization of the legal profession whose members are interested in legal issues relating to government contracts. Division 10 has a substantial and continuing interest in the promotion of the sound development of Federal law in the field of public contracts.

STATEMENT OF THE CASE

This case involves a challenge to a cost accounting standard promulgated in 1972 by the Cost Accounting Standards Board ("CASB") pursuant to § 719 of the Defense Production Act Amendments of 1970, 50 U.S.C. app. § 2168.[1] The CASB was established in early 1970 as "an agent of Congress . . . independent of the executive departments," *id.* § 2168(a), composed of the Comptroller General of the United States as Chairman and four members appointed by him. *Id.*[2] The CASB was authorized to promulgate uniform cost accounting standards to "be used by all relevant Federal agencies" and by government defense contractors and subcontractors in large negotiated national defense procurement contracts. *Id.* § 2168(g).[3] The CASB was also empowered "to make, promulgate, amend, and rescind" rules and regulations for the implementation of such standards. *Id.* § 2168(h).

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[1] The Defense Production Act Amendments of 1970, 50 U.S.C. app. § 2168, are set out at Pet. App. F-2.

[2] The history of the legislation establishing the CASB is set forth in S. Rep. No. 890, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 3768, 3769-72.

[3] CASB regulations define a relevant Federal agency as "any Federal agency making a national defense procurement and any agency whose responsibilities include review, approval, or other action affecting such a procurement." 4 C.F.R. § 331.20(a) (1982).

The CASB's duly promulgated standards, rules, and regulations "have the full force and effect of law," *id.* § 2168(i)(A), and the requirements set forth in the CASB's regulations are "binding upon all relevant Federal agencies and upon defense contractors and subcontractors." 4 C.F.R. § 331.10 (1982).[4]

The standard at issue in this case is Cost Accounting Standard ("CAS") 403.[5] This standard, which was included in a cost-plus-fixed-fee contract between the Air Force and Boeing as of January 1974,[6] was construed to

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[4] After the promulgation of 19 standards, and rules and regulations implementing those standards, the CASB's work was deemed complete by Congress and its appropriation first reduced in 1980, and then terminated in 1981. *Senate Committee on Banking, Housing, and Urban Affairs, Defense Production Act Extension of 1982*, S. Rep. No. 412, 97th Cong., 2d Sess. 1-2 (1982). Nevertheless, the CASB's standards, rules, and regulations "still have the full force and effect of law and must be observed in both existing and future negotiated national defense contracts." *Id.* at 2. Because the CASB is defunct, the standards it promulgated "can be modified only by acts of Congress or by an agency [that may in the future be] authorized by law to exercise authority similar to the . . . authority of the [CASB]." *Transfer of Cost Accounting Standards Board: Hearing Before The Senate Committee on Banking, Housing, and Urban Affairs*, 96th Cong., 2d Sess. 5 (1980) (statement of Elmer Staats, Comptroller General of the United States). The 96th and 97th Congresses failed to act on proposed legislation to transfer the functions of the defunct CASB to the Office of Management and Budget. *See, e.g.*, S. 2375, 97th Cong., 2d Sess. §§ 202-203 (1982); H.R. 5540, 97th Cong., 2d Sess. (1982) (proposed amendment of Rep. Lundine, 128 Cong. Rec. H7,175-76 (daily ed. Sept. 16, 1982)).

[5] 4 C.F.R. Part 403 (1982), *reprinted in* Pet. App. F-9.

[6] The Department of Defense announced the applicability of CAS 403 to negotiated national defense contracts in Defense Procurement Circular ("DPC") No. 72-99, *reprinted in* Pet. App. F-68. As required by CASB regulations, 4 C.F.R. § 331.30(a) (1982), the De-

mandate the use of a direct or "assessment base" method of tax cost allocation under the contract. 680 F.2d at 134. Boeing, which sought to distribute its tax costs under the contract using a proportional or "headcount" method, was disallowed a portion of its claimed tax cost on the ground that its headcount method does not comply with CAS 403. *Id.*[7] The effect of allocating directly rather than proportionately is to reduce the allocation of tax costs to Boeing Aerospace, which works almost exclusively under government contract, and to increase the allocation of such costs to Boeing Commercial Airplane Co.[8]

The Contracting Officer, following a report made to him by the Defense Contract Audit Agency, on March 6, 1974, issued a final decision disallowing the disputed costs.[9] The Armed Services Board of Contract Appeals

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partment of Defense in DPC No. 72-99 incorporated into its procurement regulations a contract clause promulgated by the CASB that, among other things, commits contractors to "[c]omply with all Cost Accounting Standards in effect on the date of award of [the] contract . . . [and to] comply with any Cost Accounting Standard which hereafter becomes applicable to a contract or subcontract of the contractor." 4 C.F.R. § 331.50 (1982) (Cost Accounting Standards Clause ¶ (a)(3)).

[7] Under the direct allocation method, Boeing would directly allocate its state and local tax expenses to its various divisions "by using the base which was used to measure the particular tax. For example, because property taxes are assessed on the value of property, [a given Boeing division] would be allocated the property taxes attributable to the property it controls." 680 F.2d at 134. Boeing's headcount method, by contrast, would distribute tax costs to each division "in proportion to the number of employees working in each [division]." *Id.*

[8] *See The Boeing Co.*, ASBCA No. 19,224, 79-1 BCA (CCH) ¶ 13,708, p. 67,247 (1979), *reprinted in* Pet. App. C-1.

[9] *Id.*

("ASBCA") on February 18, 1977, denied an appeal from the Contracting Officer's decision, rejecting Boeing's motion for reconsideration on January 31, 1979.[10] The Court of Claims on June 2, 1982, affirmed the ASBCA's decision, Pet. App. A-1, and on August 20, 1982, denied Boeing's motion for rehearing and suggestion of rehearing *en banc*. Pet. App. D-1.[11]

In its opinion, the Court of Claims held that the ASBCA's interpretation of CAS 403 was correct, 680 F.2d at 135-38, and that, as thus construed, CAS 403 did not contradict the terms or purposes of the Defense Production Act Amendments of 1970, 50 U.S.C. app. § 2168, or of related statutes. 680 F.2d at 138-39. The Court of Claims also rejected Boeing's claim that, in promulgating CAS 403, the CASB failed to comply with statutory notice and comment requirements. *Id.* at 139-40.

The Court of Claims declined to reach Boeing's claim that CAS 403 was an unconstitutional exercise of power by the CASB. 680 F.2d at 140-41. Boeing had argued that because the CASB's members were not appointed by the President with the advice and consent of the Senate pursuant to the Appointments Clause of the Constitution, art. II, § 2, cl. 2, the CASB could not constitutionally promulgate rules binding upon Executive Branch

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[10] *See The Boeing Co.*, ASBCA No. 19,224, 77-1 BCA (CCH) ¶ 12,371 (1977), Pet. App. B-1, *confirmed on reconsideration*, ASBCA No. 19,224, 79-1 BCA (CCH) ¶ 13,708 (1979), Pet. App. C-1.

[11] The Court of Claims was merged into the United States Court of Appeals for the Federal Circuit effective October 1, 1982, Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982), following entry of the judgment challenged herein.

agencies.[12] Boeing also argued that even if the CASB's members were not performing those functions that may be performed only by "Officers of the United States" appointed pursuant to the Appointments Clause, then the CASB was impermissibly exercising legislative power reserved to the Congress under Article I, § 7 of the Constitution.[13]

The Court of Claims refused to address these claims, suggesting that the actual source of Boeing's alleged injury was not CAS 403 but rather Defense Procurement Circular No. 72-99, in which the Department of Defense announced the applicability of CAS 403 to negotiated national defense procurement contracts.[14] The court also appeared to reason that, even if CAS 403 were the actual source of Boeing's injury and its promulgation an exercise of unconstitutional power, invalidation of CAS 403 would be precluded by "the principle of the *de facto* officer," which it assumed was applied by this Court decision in

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[12] *See* Boeing's Petition in the Court of Claims ("Ct. Cl. Pet.") at 9-10; Plaintiff's Motion For Summary Judgment and Brief ("Plaintiff's Motion") at 87, 90-91.

[13] Ct. Cl. Pet., *supra* note 12, at 10; Plaintiff's Motion, *supra* note 12, at 90-91.

[14] The stated purpose of DPC No. 72-99 was "to establish initial Department of Defense policies and procedures for compliance with" the Defense Production Act Amendments of 1970, 50 U.S.C. app. § 2168. Pet. App. F-38. DPC No. 72-99 noted that the Act, "as implemented by the Cost Accounting Standards Board (4 C.F.R. Sec. 331 *et seq.*), requires the development of Cost Accounting Standards to be used in connection with negotiated national defense contracts and the disclosure of cost accounting practices to be used in such contracts." *Id.*

The CASB had promulgated CAS 403 over the objection of the Department of Defense, whose cost principles for national defense contracts had theretofore been embodied in § 15 of Armed Services

Buckley v. *Valeo*, 424 U.S. 1, 142-43 (1976) (*per curiam*).[15]

REASONS FOR GRANTING THE WRIT

The CASB's promulgation of CAS 403 is constitutionally problematic in two basic respects. *First*, the standard is an exercise of rulemaking power by a Federal agency whose members were not appointed by the President with the advice and consent of the Senate, contrary to this Court's holding in *Buckley* that such rulemaking power may be exercised only by "Officers of the United States" appointed in the manner prescribed by the Appointments Clause. *Second*, as an effort by Congress, through the instrument of a Legislative Branch agency, indirectly to bind Executive Branch decisionmaking, CAS 403

Procurement Regulations ("ASPR"), now modified to reflect the promulgation of CASB standards. 32 C.F.R. § 15 (1982). *See* Defense Contract Audit Agency, Comments re Allocation of Home Office Expenses to Segments (July 31, 1972), Exh. C.50 to Affidavit of Harold F. Olsen in Support of Plaintiff's Motion for Summary Judgment in Court of Claims ("Olsen Aff."); Office of Assistant Secretary of Defense, Comment re Proposed Cost Accounting Standard (Sept. 12, 1972), and Memorandum to Assistant Secretary of Defense from Deputy Assistant Secretary of Defense (Procurement) (Nov. 3, 1972), Exh. C.154 to Olsen Aff.

[15] In *Buckley*, this Court concluded that "the [Federal Election] Commission's inability to exercise certain powers because of the method by which its members have been selected should not affect the validity of the Commission's administrative actions and determinations to this date. . . ." 424 U.S. at 142. This Court ruled that "[t]he past acts of the Commission are therefore accorded *de facto* validity, just as we have recognized should be the case with respect to [statutes enacted by] legislators held to have been elected in accordance with an unconstitutional apportionment plan." *Id.* No direct challenge to any regulation of the Federal Election Commission was before the Court in *Buckley*. *See id.* at 116-17.

amounts to lawmaking in circumvention of the Presentment Clause, art. I, § 7, cl. 2, by-passing the requirement of adoption by both Houses of Congress and approval by the President.

Evading the requirements of the Appointments Clause and the Presentment Clause, CAS 403 calls into question basic separation-of-powers norms. The exercise of power represented by the CASB's promulgation of CAS 403 is flatly inconsistent with the separation-of-powers principles articulated in *Buckley*, and in the one-house legislative veto cases now pending in this Court on certiorari and on appeal.[16] If allowed to stand, CAS 403 would set a precedent of far-reaching significance, going to the heart of the relationship between the Legislative and Executive Branches. Whether such exercises of power should be countenanced is a question that warrants this Court's plenary review.[17]

I. The Court Below Erred In Refusing To Address The Petitioner's Constitutional Challenge To CAS 403

The Court of Claims refused to address the petitioner's constitutional challenge to CAS 403 on two mistaken premises. *First*, contrary to the court's supposition, De-

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[16] *Chadha* v. *INS*, 634 F.2d 408 (9th Cir. 1980), *consideration of jurisdiction postponed until hearing on merits*, 102 S. Ct. 87 (1981); *Consumer Energy Council* v. *FERC*, 673 F.2d 425 (D.C. Cir.), *appeal docketed*, 51 U.S.L.W. 3099 (U.S. Aug. 2, 1982) (No. 82-177). *See also American Federation of Government Employees* v. *Pierce*, 697 F.2d 303 (D.C. Cir. 1982) (*per curiam*). The District of Columbia Circuit Court of Appeals applied its analysis in *FERC* to invalidate a two-house veto provision in *Consumers Union* v. *FTC*, 691 F.2d 575 (D.C. Cir. 1982) (*per curiam*) (*en banc*), *jurisdictional statement filed sub nom. U.S. Senate* v. *FTC*, 51 U.S.L.W. 3488 (U.S. Jan. 4, 1983) (No. 82-935).

[17] That Congress in 1981 terminated the funding of the CASB in no way lessens the concrete injury suffered by petitioner; the CASB's standards themselves remain in effect. *See supra* note 4.

fense Procurement Circular ("DPC") No. 72-99 was *not* an independent source of the petitioner's claimed injury: The Department of Defense applied CAS 403 to the petitioner because it was *required* to do so by § 719 of the Defense Production Act Amendments of 1970, 50 U.S.C. app. § 2168,[18] and by the regulations of the CASB, 4 C.F.R. § 331.10 (1982).[19] The Defense Department applied CAS 403 to the petitioner through DPC No. 72-99 for that reason alone.[20]

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[18] *See also* S. Rep. No. 412, *supra* note 4, at 2.

[19] *See also* 4 C.F.R. § 331.50 (1982), *supra* note 6. The court's unwillingness to regard CAS 403 as the decisive source of the petitioner's injury for purposes of assessing the petitioner's *constitutional* claims is inexplicable in light of the court's willingness to reach such *non-constitutional* issues as whether CAS 403 was faithful to § 719 of the Defense Production Act Amendments of 1970, or had been promulgated in compliance with statutory notice and comment requirements. For under the rationale by which the Court of Claims refused to reach the *constitutionality* of CAS 403, it was DPC No. 72-99, which adopted the standards embodied in CAS 403, that the court considered properly before it, and not CAS 403 itself.

[20] *See supra* note 14. Invalidation of DPC No. 72-99 would automatically follow from invalidation of CAS 403, for DPC No. 72-99 was predicated entirely on CAS 403, and it is settled that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC* v. *Chenery Corp.*, 317 U.S. 80, 87 (1943). The observation of the court below that the Defense Department "had the independent authority to accept the standard," 680 F.2d at 141, thus both avoids the pertinent question and is in any event irrelevant. Its observation avoids the pertinent question because the issue here is not whether the Defense Department had "independent" authority to *adopt* the standard, but whether the Defense Department had any authority to *reject* it. Indeed, the record indicates that the Department *would* have rejected the standard had it believed that it had the authority to do so. *See supra* note 14. The Defense Department, prior to the promulgation of CAS 403, relied on the cost principles embodied in ASPR § 15.

Second, nothing in *Buckley* v. *Valeo* suggests that "the principle of the *de facto* officer" may be invoked to immunize Appointments Clause violations from constitutional review, or to place injuries fairly traceable to such violations beyond judicial redress. Indeed, in a case decided last Term less than a month after the decision below was announced, this Court—citing *Buckley*—unhesitatingly reached the merits of the constitutional challenge presented in an analogous context and granted relief to the complaining party. *See Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 102 S. Ct. 2858, 2880 & n. 41 (1982).[21]

Leaving the validity of CAS 403 cast in a shroud of uncertainty, the judgment below, if allowed to escape this

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See id. Even if, in the absence of the Defense Production Act's mandate, the Defense Department *might* have adopted the standard embodied in CAS 403, the fact is that the Department did not do so; and the Department's action "must be measured by what [it] did, not by what it might have done." *Chenery*, *supra*, 317 U.S. at 93-94. *Cf. Regents of University of California* v. *Bakke*, 438 U.S. 265, 320 n.54 (1978) (because no question existed that respondent's rejection from medical school was based on an impermissible reason, petitioner would not be allowed to "hypothesize that it might have employed lawful means of achieving the same result").

[21] *Accord Glidden Co.* v. *Zdanok*, 370 U.S. 530, 535-36 (1962) (plurality opinion) ("so-called *de facto* doctrine" precluding review of party's challenge, asserted for first time on appeal, to trial court's authority must give way "when the challenge is based upon nonfrivolous constitutional grounds"). Thus we believe that this Court's precedents do not preclude review of the petitioner's Appointments Clause challenge. In any event, the standard here at issue is challenged not only under the Appointments Clause as the act of an invalidly constituted agency, but also as an impermissible effort by Congress to make law binding on the Executive Branch without satisfying the requirements of the Presentment Clause.

Court's plenary review, would perpetuate confusion and doubt in the negotiation of large national defense procurement contracts. Thus, this Court should review the petitioner's constitutional challenge to CAS 403.[22]

II. CAS 403 Represents A Radical Departure From Settled Separation-Of-Powers Norms

Once petitioner's right to relief is recognized, the standard's obvious departure from established separation-of-powers priciples comes quickly into focus. As the government itself conceded below, "Congress cannot constitutionally delegate to a Legislative branch entity the

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[22] Contrary to the government's suggestion in the court below, the relief requested by petitioner would not necessarily involve "retroactively [striking] the CASB standards from the thousands of contracts which have incorporated them over the past nine years." Defendant's Reply to Plaintiff's Response to Defendant's Cross-Motion for Summary Judgment ("Defendant's Reply") at 22. Only CAS 403 was before the court below, and only as it was applied to the petitioner in those contracts in which the petitioner itself reserved the right to challenge the standard.

The Court of Claims was, of course, authorized to declare an Act of Congress unconstitutional where, as here, a plaintiff came before the court seeking money allegedly due him. *See Gentry* v. *United States*, 546 F.2d 343, 346 (Ct. Cl. 1976); *Pauley Petroleum, Inc.* v. *United States*, 591 F.2d 1308, 1314-15 (Ct. Cl.), *cert. denied*, 444 U.S. 898 (1979); *United States* v. *Lovett*, 328 U.S. 303, 314 (1946). Here, as in *Gentry*, "the issue of the consitutional validity of the [statute] arises only incidentally, necessitating an answer by the court in the course of construing the . . . statute to determine *whether* payment is indeed owing to plaintiff." 546 F.2d at 346 (emphasis added).

Thus, the observation of the court below that it was "not authorized to enter a declaratory judgment on the validity of the CASB as it was composed," unless it did so in the context of granting monetary relief to Boeing, 680 F.2d at 141 n.16, may have been correct, but

authority to impose binding substantive regulations on the Executive branch, for that would violate basic separation of powers principles."[23] In empowering the CASB to promulgate such standards as CAS 403, Congress accomplished precisely such a result, and, in so doing, circumvented the requirements of the Appointments Clause and the norms underlying the Presentment Clause.

A. The CASB Was Without Authority To Promulgate CAS 403 Because Its Members Were Appointed In A Manner Contrary To The Appointments Clause

This Court in *Buckley* squarely held that rulemaking "represents the performance of a significant governmental duty exercised pursuant to a public law." 424 U.S. at 140-41; *see Consumer Energy Council*, 673 F.2d at 457. Thus, viewed as an exercise of rulemaking power, CAS

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should not have proven fatal to Boeing's claim; for, as we demonstrate, Boeing *would* be entitled to monetary relief were its consitutional challenges to be sustained. We urge this Court, should it sustain any of the petitioner's challenges to CAS 403, to fashion its remedy along the lines employed in *Northern Pipeline*. There, this Court, while ruling that its judgment invalidating § 241(a) of the Bankruptcy Act of 1978, 28 U.S.C. § 1471, should not apply retroactively but only prospectively, affirmed the relief sought by respondent Marathon *in that case*—namely, dismissal of the suit brought against it by Northern Pipeline in bankruptcy court pursuant to the 1978 Act. 102 S. Ct. at 2880.

[23] Defendant's Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment ("Defendant's Cross-Motion") at 70. In the Court of Claims, the government and Boeing parted company on whether the CASB's standards *need* be deemed binding. Defendant's Reply, *supra* note 22, at 20 n.3; *see id.* at 18-19; *see* Defendant's Cross-Motion, *supra*, at 71-72. That the CASB's standards were *meant* to be binding, and *are* binding, on Executive Branch agencies is clear. *See supra* pages 3-4 and notes 3-6.

403 properly could have been promulgated "only by persons who are 'Officers of the United States'," *Buckley*, 424 U.S. at 141—that is, by persons "appointed in the manner prescribed by [the Appointments Clause]." *Id.* at 126. Because the members of the CASB were not appointed in conformity with the Appointments Clause, their purported exercise of rulemaking power was constitutionally impermissible. *Id.* at 141.[24]

B. The Promulgation Of CAS 403 Circumvented The Requirements Of The Presentment Clause

Even if the members of the CASB had been appointed pursuant to the Appointments Clause, serious questions would exist whether a Legislative Branch agency may

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[24] As noted above, the CASB was composed of the Comptroller General and four other members appointed by him. 50 U.S.C. app. § 2168(a). Although the four other members were appointed by the Comptroller General, nothing in § 2168 suggests that the members of the CASB are not co-equals. The Comptroller General, of course, is appointed by the President with the advice and consent of the Senate. 31 U.S.C. § 42. But Elmer Staats, who served as Comptroller General during the entire active life of the CASB, was appointed to his 15-year term as Comptroller General five years *before* the CASB was established, and thus, as Boeing observed, cannot be said to have been appointed "in his capacity as chairman of the [CASB]." Plaintiff's Motion, *supra* note 12, at 89. Thus, even if CAS 403 were not independently vulnerable to Presentment Clause challenge, petitioner's Appointments Clause challenge would not be answered by the fact that the Comptroller General was appointed to his position as head of the General Accounting Office pursuant to the Appointments Clause.

Nor was it asserted below that the CASB itself was established as a subordinate entity of the General Accounting Office; indeed, the legislative history of the CASB unambiguously demonstrates the contrary. Thus, the initial version of § 719 of the Defense Production Act Amendments would have directed the GAO *itself* to promulgate

constitutionally prescribe rules binding on Executive Branch agencies—or whether such rules, emanating from an "agent of the Congress . . . independent of the executive departments," 50 U.S.C. app. § 2168(a), must be deemed legislation enacted without satisfying the requirements of the Presentment Clause.

That such rules must fall to Presentment Clause challenge would seem to follow from the one-house legislative veto decisions now pending in this Court on certiorari and on appeal. *See supra* note 16. For the standards promulgated by the CASB not only "vetoed" the ASPR theretofore applied by the Department of Defense, *see supra* notes 14 and 20, but positively supplanted such rules with those devised by the CASB. Thus, viewed as an indirect—albeit nonetheless aggressive—form of legislative veto, CAS 403 circumvents "the fundamental prerequisites to the enactment of federal laws: bicameral passage of the legislation, and presentation for approval or disapproval by the President." *Consumer Energy Council*, 673 F.2d at 456.

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uniform cost accounting standards, but the legislation that was ultimately enacted established the CASB as a separate body—"an agent of Congress," 50 U.S.C. app. § 2168(a)—to do so. *See* S. Rep. No. 890, *supra* note 2, at 3769.

Thus, the Appointments Clause issue in this case does not require this Court to decide the extent to which Congress may by statute augment the powers of a sitting Officer of the United States without effectively circumventing the requirement of presidential appointment with the advice and consent of the Senate. For here Congress did not simply augment the Comptroller General's powers as head of the GAO, but appointed him chairman of a wholly new agency.

As the District of Columbia Circuit Court of Appeals observed in *Consumer Energy Council*:

> The requirements of presentation to the President and bicameral concurrence ultimately serve the same fundamental purpose: to restrict the operation of the legislative power to those policies which meet the approval of three constituencies, or a supermajority of two.

673 F.2d at 464. On this reasoning, "[i]f [CAS 403] represents an exercise of the legislative power, then, it must be exercised only in compliance with these constitutional requirements." *Id.* at 464-65.[25]

As noted above, the government itself has all but conceded the invalidity of CAS 403 as an exercise of rulemaking power by a Legislative Branch agency binding on Executive Branch agencies. *See supra* pages 11-12 and note 23. Inasmuch as this Court, as the District of Columbia Circuit Court recently observed, "has held that rulemaking is substantially a function of administering and enforcing the public law," *Consumer Energy Council*, 673 F.2d at 471, it follows that "Congress may not create a device enabling it, or one of its [agents], to control agency rulemaking." *Id.*

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[25] In the instant case, not only did Congress empower the CASB, its agent, to veto—*i.e.*, supplant—Executive Branch decisionmaking; in addition, Congress by statute retained power by concurrent resolution to veto any such exercise of power by its agent. 50 U.S.C. app. § 2168(h)(3). *See* 50 U.S.C. app. § 2168(i) (CASB regulations "have the full force and effect of law"). Congress thus not only has asserted an indirect power to veto Executive Branch decisionmaking without complying with the requirements of the Presentment Clause, but has even retained the power directly to veto any such veto of its agent. The Comptroller General, of course, is a Legislative Branch officer, *cf.* 31 U.S.C. § 65(d), who can be removed only by Congress. *Id.*

This principle applies with particular force in the instant case, where the agency whose actions are subject to control—the Department of Defense—is an agency intimately involved in the performance of vital Executive Branch functions. Whether such an attempt by Congress to control decisionmaking by Executive Branch departments does indeed violate the separation-of-powers principles embodied in the Presentment Clause is a question that independently warrants plenary review by this Court on certiorari.

CONCLUSION

In establishing the CASB as its agent and empowering it directly to interfere with Executive Branch rulemaking, Congress intensified the "long tug of war between the Executive and Legislative Branches of the Federal Government respecting the permissible extent of legislative involvement in rulemaking under statutes which have already been enacted." *Buckley*, 424 U.S. at 140 n.176. For this and for all of the foregoing reasons, the petition for certiorari in this case should be granted to resolve the fundamental separation-of-powers issues presented herein.

Respectfully submitted,

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